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MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

GREGORY A. CHRISTIAN, *et al.*, Plaintiffs, v. BP AMOCO CORPORATION, *et al.*, ATLANTIC RICHFIELD COMPANY, *et al.*, Defendants.	Cause No. DV-08-173 Hon. Brad Newman **ATLANTIC RICHFIELD COMPANY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR RESTORATION DAMAGES AS BARRED BY CERCLA AND RESPONSE TO PLAINTIFFS' CROSS-MOTION**

COMES NOW Defendant Atlantic Richfield Company ("Atlantic Richfield"), by and through its counsel of record, and hereby submits its combined reply in support of its motion for

I. ATLANTIC RICHFIELD'S COMBINED REPLY AND RESPONSE ON MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR RESTORATION DAMAGES

summary judgment on Plaintiffs' claim for restoration damages as barred by CERCLA, and its response to Plaintiffs' related cross-motion.

INTRODUCTION

Plaintiffs' Response fails to address the central premise of Atlantic Richfield's Motion—that the restoration award Plaintiffs seek constitutes a "challenge" to the ongoing cleanup directed by EPA and thus is barred by CERCLA. Under Montana law, Plaintiffs' requested award of restoration damages requires a judicial finding that they actually will perform their proposed environmental cleanup with the money awarded. In this case, the cleanup Plaintiffs must perform includes (1) constructing an 8,000-foot underground barrier wall on property not owned by any Plaintiff and (2) removing two feet of soil on each of Plaintiffs' properties, hauling that soil out of state, and replacing it with soil not approved by EPA. Plaintiffs do not explain how they could perform these remedies—remedies that EPA has already specifically rejected—at an active federal Superfund Site without that being a "challenge" to the remedy that EPA selected and is still performing at the site. The answer, of course, is that they cannot. For this reason alone, the Motion should be granted.

CERCLA section 113(h) bars any "challenge" to EPA's chosen remedy and provides a statutory defense to Plaintiffs' restoration claim. Plaintiffs' arguments to avoid the statute's straightforward application are meritless. First, Plaintiffs focus on federal preemption of state laws, a concept completely separate from the federal statutory defense asserted here and irrelevant to this Motion. Second, Plaintiffs rely on CERCLA's savings clauses and the conflicting legislative history of CERCLA. As demonstrated below, however, CERCLA's savings clauses plainly state that they do not affect section 113(h)'s ban on challenges to EPA's chosen remedy, and the legislative history cannot alter the plain language of the statute. Third, Plaintiffs argue that Atlantic Richfield ignores established law, but Plaintiffs' "established law"

turns out to be a single district court case from Florida. Even that case, however, does not support Plaintiffs' argument because, in a key difference between Florida and Montana law, the plaintiffs there did not have to prove that they would actually perform their restoration remedy. The overwhelming weight of federal appellate law demonstrates that Plaintiffs' restoration claim constitutes an impermissible "challenge" to an EPA remedy under section 113(h).

Plaintiffs' Response also fails to rebut Atlantic Richfield's second, separate ground for summary judgment—that CERCLA section 122(e)(6) bars private cleanups at a site where EPA is performing a CERCLA cleanup, absent EPA's authorization. Plaintiffs do not claim to have EPA's permission to perform their cleanup—nor could they, since EPA rejected it. Instead, Plaintiffs argue that they qualify for the narrow defenses to CERCLA liability and thus are outside the scope of the statute. But Plaintiffs do not offer a shred of evidence to support their claim to such defenses—which is their burden to prove—and the record evidence shows that they could not qualify for such defenses in any event.

Atlantic Richfield's Motion should therefore be granted, and Plaintiffs' cross-motion should be denied.

ARGUMENT

I. Plaintiffs' Restoration Claim Is Barred By CERCLA Section 113(h).

Plaintiffs' proposed cleanup is a facial challenge to EPA's selected remedy under section 113(h). In their limited discussion, Plaintiffs ignore the statute's actual text and the authoritative interpretations of that text by federal appellate courts, including the Ninth Circuit. Instead, Plaintiffs focus on various snippets of legislative history and a trial court decision discussing that history. However, as discussed below, even Plaintiffs' authority supports Atlantic Richfield's Motion. And, the only reported case to consider a restoration damages claim where the plaintiff was required by law to actually perform its cleanup plan—the *General Electric* case from the

Tenth Circuit—held that the restoration claim was barred by section 113(h). Plaintiffs' Response also contains a lengthy discussion of federal preemption and the various savings clauses in CERCLA. Neither, however, is relevant to the Court's decision on this Motion, which requires only a straightforward application of section 113(h) to the facts of this case.

A. Implementing A Remedy That Was Rejected By EPA Impermissibly "Challenges" EPA's Selected Remedy.

Plaintiffs do not dispute that the statutory prerequisites to the application of section 113(h)—that EPA has initiated removal or remedial actions at the Site under CERCLA—are satisfied. *See* Resp. at 12-13. Therefore, the only question is whether Plaintiffs' claim for restoration damages "challenges" EPA's selected remedy within the meaning of section 113(h).

1. Plaintiffs' Restoration Claim Challenges EPA's Remedy Because It Is "related to the goals of the cleanup," "seeks to dictate specific remedial actions," And Will "interfere with the remedial actions selected" By EPA.

Plaintiffs' restoration claim seeks a judgment from this Court allowing them—indeed, requiring them—to implement a remedy at the Anaconda Smelter Superfund Site that was considered and rejected by EPA. Plaintiffs do not dispute that to recover restoration damages, the jury must find that they will perform this remedy at the Site. Nor do Plaintiffs deny that their proposed remedy will require extensive construction activities on property not owned by them, extensive removal and disposal of soil, and replacement with soil from unidentified and unapproved sources. Finally, Plaintiffs do not deny that, in the course of its regulatory deliberations, EPA rejected remedies just like the ones they intend to perform and that are the basis for their restoration damages claim.

Given these facts, there is simply no way that Plaintiffs' claim does not amount to a "challenge" to EPA's remedy under the text of section 113(h) and the case law interpreting it. "An action constitutes a challenge if it is related to the goals of the cleanup." *Razore v. Tulalip*

Tribes, 66 F.3d 236, 239 (9th Cir. 1995). A claim also challenges a CERCLA cleanup if it "interfere[s] with the remedial actions selected under CERCLA Section 104," or "seeks to improve on the CERCLA cleanup." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995). Claims also are impermissible challenges under section 113(h) "where the plaintiff seeks to dictate specific remedial actions" or "alter the method and order of cleanup." *ARCO Envtl. Remediation, LLC v. Dep't Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000). Plaintiffs neither address these authoritative cases from the Ninth Circuit applying section 113(h), nor do they rebut Atlantic Richfield's arguments based on them. *See Joyner v. Onstad* (1989), 240 Mont. 362, 364, 783 P.2d 1383, 1385 (summary judgment appropriate where non-movant "did not deny nor rebut defendants' arguments" and "did not set forth any facts showing that a genuine issue existed for trial").

Plaintiffs suggest that, if they could perform their cleanup in such a way that it would not conflict with EPA's ongoing cleanup activities at the site, it would not be an impermissible challenge under section 113(h). *See* Resp. at 11, 18-19. This is incorrect. In *Razore*, the plaintiffs contended that section 113(h) should not apply because "the district court could have fashioned ... remedies that will not interfere with ... [EPA's] selected cleanup plan." 66 F.3d at 239. The court swiftly "reject[ed] this argument" because, regardless of whether the proposed remedy "interferes" with the EPA-approved cleanup plan, the plaintiffs' claim nonetheless "related to the goals of the cleanup." *Id.* Thus, even if Plaintiffs could perform their restoration remedy without "interfer[ing] with the remedial actions selected [by EPA] under CERCLA"—difficult to imagine where Plaintiffs intend to perform an area-wide cleanup at a site where EPA's cleanup is ongoing—they cannot circumvent section 113(h). Their claim still would be "related to the goals of the cleanup," it still would "seek to improve on the CERCLA cleanup,"

and it still would "seek to dictate specific remedial actions" at the Site. Thus, section 113(h) still would bar Plaintiffs' restoration claim.[1]

Plaintiffs declare—without any authority—that "[c]hallenges are narrowly construed in the context of section 113(h)." Resp. at 13. The law is just the opposite. Section 113(h) is a "blunt withdrawal of ... jurisdiction," and "the unqualified language of the section precludes 'any challenges' to CERCLA Section 104 cleanups, not just those brought under provisions of CERCLA." *McClellan*, 47 F.3d at 328; *see also Razore*, 66 F.3d at 238 ("Section 113(h) ... bans *all* challenges to ongoing remedial or removal actions.") (emphasis added). Plaintiffs' claim for restoration damages, based on a far-reaching alternative remedy that was rejected by EPA, easily fits the statutory definition of a challenge.

As discussed in Atlantic Richfield's opening brief, CERCLA provides for extensive public input throughout EPA's remedy selection process. *See* Br. at 3-4. Accordingly, Plaintiffs had the opportunity to comment on EPA's remedial decisions that apply to their properties—and some, in fact, did so. But once EPA finalized those decisions, section 113(h) prohibits Plaintiffs from challenging them. Part of EPA's decision-making process at this Site was rejecting the remedies that Plaintiffs now offer as the basis for their restoration damages. Asking this Court to enter an order allowing Plaintiffs to perform those EPA-rejected remedies—and requiring Atlantic Richfield to pay for it—is an impermissible challenge to EPA's remedy and thus is barred by section 113(h).

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[1] Plaintiffs also suggest that section 113(h) applies only to challenges brought by "polluters." Resp. at 11-12. That is inaccurate. Courts have repeatedly applied section 113(h) to bar challenges by citizens' groups that were dissatisfied with EPA's selected remedy. *See, e.g.*, *McClellan*, 47 F.3d 325; *Hanford Downwinders Coalition v. Dowdle*, 71 F.3d 1469 (9th Cir. 1995); *Anacostia Riverkeeper v. Wash. Gas Light Co.*, 892 F. Supp. 2d 161 (D.D.C. 2012).

2. CERCLA's Legislative History Cannot Trump The Actual Text Of Section 113(h).

Plaintiffs repeatedly cite to portions of the legislative history of section 113(h) and a Florida district court case that discusses that history, *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303 (N.D. Fla. 2001). Plaintiffs urge the Court to focus on the legislative history instead of the actual text of section 113(h), arguing that "the text must not convince this Court to enforce a result Congress specifically meant to avoid." Resp. at 13. But the law is just the opposite: "absent ambiguity in the language of the statute ... this Court may not consider legislative history or any other means of statutory construction." *Glendive Med. Ctr., Inc. v. Mont. Dep't of Pub. Health & Human Servs.*, 2002 MT 131, ¶ 15, 310 Mont. 156, 49 P.3d 560; *see also McKirdy v. Vielleux*, 2000 MT 264, ¶ 22, 302 Mont. 18, 19 P.3d 207 ("[I]t is beyond dispute that, in ascertaining the Legislature's intent, we are bound by plain and unambiguous language used in a statute and may not consider legislative history or any other means of statutory construction.").[2] Plaintiffs do not contend that section 113(h) is ambiguous, nor could they—the statute's language "is clear and unequivocal." *McClellan*, 47 F.3d at 328.

Thus, the Court need not consider the legislative history of CERCLA to decide this Motion. And there are good reasons for this rule. As the Supreme Court has recognized, "legislative history is itself often murky, ambiguous, and contradictory," and "[j]udicial investigation of legislative history has a tendency to become ... an exercise in looking over a crowd and picking out your friends." *Exxon Mobil*, 545 U.S. at 568 (internal punctuation and citation omitted). This is especially true of CERCLA, whose "legislative history ... furnishes at

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[2] *Accord Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *Hearn v. W. Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995) ("[L]egislative history—no matter how clear—can't override statutory text.").

best a sparse and unreliable guide to the statute's meaning." *Artesian Water Co. v. Gov't of New Castle Cnty.*, 851 F.2d 643, 648 (3d Cir. 1988); *see also Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989) (CERCLA has "an indefinite, if not contradictory, legislative history."). The *Samples* case is a prime example of the wisdom of this rule. In its extended analysis of the legislative history of section 113(h), the court reviewed many inconsistent, and in some instances, outright conflicting statements of intent by various legislators. *See Samples*, 165 F. Supp. 2d at 1309-15. As discussed below, however, the actual holding of that case does not assist Plaintiffs here, and is entirely consistent with Atlantic Richfield's argument.

Plaintiffs' many citations to CERCLA's legislative history are therefore irrelevant to this Court's application of the statute's unambiguous text.

3. The Case Law On Restoration Damages And Section 113(h) Demonstrates That Plaintiffs' Restoration Claim Is Barred.

The only case applying section 113(h) to a request for restoration damages where the plaintiff was required to use any money awarded for the cleanup is *New Mexico v. General Electric Company*, 467 F.3d 1223 (10th Cir. 2006). Plaintiffs mischaracterize the holding of this case by representing that "[t]he court found that New Mexico could not maintain any of these private common law claims not because of CERCLA, but because they did not survive under state law," Resp. at 16, and that "the sole remaining claim in New Mexico's lawsuit (a CERCLA NRD claim) was found to conflict with and challenge the existing CERCLA remedy for remediation." *Id.* at 17. In fact, the case held just the opposite: New Mexico dismissed all of its federal claims, including its CERCLA NRD claim, and the Tenth Circuit held that its state law claims for restoration damages were barred by section 113(h).

In *General Electric*, the state initially filed two lawsuits: "[t]he first, filed in federal court, alleged claims for money damages under CERCLA § 9607(f)(1);" the second suit, filed in

state court, alleged various state law causes of action, "including trespass, public nuisance, and negligence." 467 F.3d at 1235-36. The defendants removed the state court action and the federal district court consolidated the two suits. *Id.* at 1236. The state then filed "a motion to dismiss all CERCLA claims ... and to remand the remaining state law claims to state court." *Id.* at 1237. The district court granted the state's motion to dismiss, "effectively ending any entitlement the State may have had to NRDs under CERCLA," but denied the motion to remand. *Id.* The state's remaining claims were "(1) common law trespass, (2) common law nuisance, (3) statutory public nuisance, and (4) common law negligence." *Id.* The district court held that the trespass claim failed as a matter of state law, but allowed the nuisance and negligence claims to proceed, and held that "the cost of restoration was the appropriate measure of damages" for these claims. *Id.* at 1238. The district court later granted summary judgment on these claims based on a failure of proof by the state. *Id.* at 1241 ("[T]he court granted summary judgment to Defendants ... on the AG's state law claims.").

The Tenth Circuit affirmed, but on the basis of CERCLA section 113(h), rather than the merits of the state's case. Although the court found that "the state's public nuisance and negligence theories of recovery" were not completely preempted by CERCLA, *id.* at 1247, it ruled that the state would be required to use any restoration damage award under these state-law claims for actual restoration work—because anything else *would* be preempted by CERCLA. *Id.* ("[W]e hold CERCLA's comprehensive NRD scheme preempts any state remedy designed to achieve something other than the restoration ... of the natural resource."). The court then held that these state law claims for restoration damages must be dismissed "[b]ecause the State's lawsuit calls into question the EPA's remedial response plan, it is related to the goals of the cleanup, and thus constitutes a 'challenge' to the cleanup under § 9613(h)." *Id.* at 1249.

Thus, *General Electric* is the only reported section 113(h) case where a plaintiff asserted state law restoration claims for "money damages, which would be available only to restore or replace the injured" property as a matter of law. *Id.* at 1250. Contrary to Plaintiffs' arguments, this case is not at all distinguishable from *General Electric*. As in *General Electric*, Plaintiffs' assert state law claims—including nuisance and negligence—for restoration damages that would be available only to restore their property. And, as in *General Electric*, Plaintiffs' claims are "in all respects, a challenge to an EPA-ordered remediation." *Id.* at 1249. Therefore, Plaintiffs' restoration claims also should be dismissed under section 113(h).

To support their argument, Plaintiffs rely on the *Samples* case.[3] That case, however, did not adopt much of the legislative history Plaintiffs quote in their Response, and the court's actual holding does little to advance Plaintiffs' argument. After a lengthy discussion of the legislative history, the court held that section 113(h) "does not affect the rights of persons to bring nuisance, trespass, or similar actions under state law for remedies within the control of state courts *which do not conflict with CERCLA*." *Samples*, 165 F. Supp. 2d at 1315 (emphasis added). Atlantic Richfield agrees: Plaintiffs' nuisance and trespass claims for certain monetary damages, such as diminution in property value, are not affected by section 113(h) because they do not conflict with CERCLA. The *Samples* court then elaborated that "[a]n obvious example of a nuisance action that conflicts with CERCLA .... would be one that in essence constitutes a challenge to a removal or remedial action as that term is used in section 113(h)." *Id.* at n.9. Again, Atlantic Richfield agrees: Plaintiffs' claim for restoration damages premised on a rejected remedy is an

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[3] The other cases Plaintiffs cite are completely inapposite. *See* Resp. at 15-16. These cases stand for the unremarkable proposition that state law claims, in most instances, can be asserted alongside CERCLA claims and are not preempted by CERCLA. None are section 113(h) cases.

"obvious example" of a common law claim that conflicts with CERCLA because it plainly constitutes a challenge to EPA's remedial decisions.

True, *Samples* held that the plaintiffs' claims for restoration damages under Florida law were not barred by section 113(h). *Id.* at 1317-18. But restoration damages under Florida law are very different from restoration damages under Montana law. Primarily, there is no requirement under Florida law that a plaintiff must actually perform the cleanup to obtain restoration damages. Restoration damages under Florida law are more limited in other ways as well; such damages cannot exceed the value of the property and are not available to private landowners in groundwater contamination cases. *See id.* In other words, private landowner restoration damages under Florida law are just another measurement of monetary damages, not materially different from diminution in value. If restoration damages in Montana were so limited, they might not be barred by section 113(h). But they are not. It is the notion that Plaintiffs actually will perform their EPA-rejected remedy—a prerequisite to an award of restoration damages under Montana law—that creates the conflict and the impermissible challenge in this case.[4]

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[4] Atlantic Richfield's Motion should be granted even under the *Samples* court's interpretation of section 113(h). But it is worth noting that *Samples* expressly "declines to follow" the line of authority from the Ninth Circuit to the extent those cases interpret section 113(h) more broadly than *Samples* did. 165 F. Supp. 2d at 1315. "[A] district court opinion does not have binding precedential effect, especially one from another federal circuit." *United States v. Ensminger*, 567 F.3d 587, 591 (9th Cir. 2009) (internal citation omitted); *see also Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 697 (7th Cir. 1998) ("district court opinions are of little or no authoritative value"). Even a non-binding court of appeals opinion, however, "is persuasive and carries substantial weight." *Back v. Carter*, 933 F. Supp. 738, 752 (N.D. Ind. 1996). Thus, although neither is binding on this Court, the Ninth Circuit's interpretations of this federal statute, which Atlantic Richfield relies upon, should be considered more persuasive authority than *Samples*.

B. Preemption Is Irrelevant.

To avoid dealing with the text of section 113(h), Plaintiffs begin their Response with a six-page discussion of preemption, and then argue that Atlantic Richfield "invites the Court to engage in an unnecessary analysis of CERCLA." Resp. at 11. In reality, the opposite is true: a preemption analysis is unnecessary and the Court need only apply the CERCLA statute to decide this Motion. A defense based on CERCLA section 113(h) is just that: a defense based on a federal statute. Federal defenses—including defenses based on federal statutes—are routinely asserted to state claims in state court. *See, e.g.*, *Amalgamated Clothing Workers v. Richmond Bros.*, 348 U.S. 511, 518 (1955) ("Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court ...."); *Collins ex rel. Collins v. Am. Home Prods. Corp.*, 343 F.3d 765, 769 (5th Cir. 2003) ("[S]tate courts are equally competent to decide federal defenses."); *see also Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999) (holding that section 113(h) can be asserted as a defense to state claims brought in state court).

Preemption is not the reason section 113(h) bars Plaintiffs' request for restoration damages. Rather, the statute limits the timing and manner in which EPA's remedial decisions can be challenged for sites under EPA regulation, and provides that such challenges—to the extent permitted—may be made only in federal court. Atlantic Richfield agrees that CERCLA does not completely preempt common law remedies. *See Gen. Elec. Co.*, 467 F.3d at 1244 ("Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination."). But CERCLA's lack of complete preemption does not curtail the application of section 113(h). *See ARCO Envtl.*, 213 F.3d at 1114-16 (discussing preemption and application of section 113(h) as separate concepts). Accordingly, the Ninth Circuit has held that section 113(h) applies equally in state court actions without discussing preemption at all. *See Fort Ord*,

189 F.3d at 832. Section 113(h) is a jurisdictional and timing statute—it deprives federal and state courts of jurisdiction to hear "any challenges" to CERCLA cleanups. *McClellan*, 47 F.3d at 328 (Section 113(h) "amounts to a blunt withdrawal" of jurisdiction for "any challenges"); *Hanford*, 71 F.3d at 1474 ("Congress included in CERCLA a Timing of Review provision ... [which] prevents federal courts from exercising jurisdiction over legal challenges to ongoing CERCLA 'removal' or 'remedial' activity."). Because Plaintiffs' restoration claim qualifies as a "challenge" to the CERCLA cleanup, the statute deprives this Court of jurisdiction to adjudicate that claim.

Preemption would only be relevant to this Motion if Plaintiffs were to assert that some rule of Montana law trumps the application of CERCLA. Atlantic Richfield does not understand Plaintiffs to be taking such a position. But if they were to do so, that would be a clear case of conflict preemption, and CERCLA section 113(h) would apply regardless of any contrary rule of Montana law. *See Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1203 (9th Cir. 2002) ("The Supremacy Clause of the Constitution provides that any state law conflicting with federal law is preempted by the federal law and is without effect."); *Vitullo v. Int'l Bhd. of Elec. Workers, Local 206*, 2003 MT 219, ¶ 31, 317 Mont. 142, 75 P.3d 1250 (similar); *see also ARCO Envtl.*, 213 F.3d at 1114-15 ("CERCLA may provide a conflict preemption defense to ... state law claims.").

Accordingly, the Court need only look to section 113(h) and the cases interpreting that section to decide if it bars Plaintiffs' restoration claim.

C. CERCLA's Savings Clauses Are Irrelevant.

Plaintiffs cite to various other sections of CERCLA, sometimes referred to as CERCLA's "savings clauses," to support their argument that section 113(h) does not bar their restoration claim. *See* Resp. at 6-7. But CERCLA itself states that none of its savings clauses affect the

operation of section 113(h), and thus, none of them matter to the determination of this Motion. In light of CERCLA's plain language and as a matter of basic statutory interpretation, courts have repeatedly rejected the argument that CERCLA's savings provisions constrain the operation of section 113(h).

Plaintiffs cite to CERCLA sections 114(a), 107(j), and 302(d) to argue that section 113(h) cannot be applied to their request for restoration damages. Plaintiffs rely most heavily on CERCLA section 302(d), which states: "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law ...." 42 U.S.C. § 9652(d). Plaintiffs quote this provision repeatedly throughout their brief.

Plaintiffs do not, however, cite the savings clause in CERCLA that directly answers whether section 113(h) can be applied to preclude state law claims. That section provides:

> [CERCLA] does not affect or otherwise impair the rights of any person under Federal, State, or common law, *except with respect to the timing of review as provided in section [113(h)] of this title* ....

42 U.S.C. § 9659(h) (emphasis added). Thus, the express language of the statute refutes Plaintiffs' argument that CERCLA's general savings clauses restrict the operation of section 113(h). *See Anacostia*, 892 F. Supp. 2d at 171 (rejecting argument that CERCLA's savings clause affects the operation of section 113(h) because section 9659(h) "makes the primacy of CERCLA § 113(h) explicit").

The Ninth Circuit also has rejected the argument that CERCLA's savings clause limits the application of section 113(h). The court held that, "if section 302(d) were to govern the interpretation of the statute, it would effectively write section 113(h) out of the Act." *Razore*, 66 F.3d at 240 (internal punctuation omitted). The court relied on the fundamental principle of

statutory construction that "[i]t is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section." *Id.*

This Court should likewise reject Plaintiffs' argument, both with respect to section 9652(d) and the other provisions cited by Plaintiffs, sections 9614(a) and 9607(j).[5] First, CERCLA makes clear in section 9659(h) that other provisions of the statute are not intended to affect the operation of section 113(h). This specific statutory provision controls the general savings clauses that Plaintiffs rely upon. *See State v. Delap* (1989), 237 Mont. 346, 348, 772 P.2d 1268, 1269 ("The general rule of statutory construction commands that the more specific statute shall control over the general statute."); *see also* § 1-2-102, M.C.A. ("When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it."). Second, if the Court were to interpret CERCLA's savings clauses to negate section 113(h), it would render 113(h) superfluous, violating a fundamental rule of statutory construction. *See State v. Berger* (1993), 259 Mont. 364, 367, 856 P.2d 552, 554 ("We are required to avoid any statutory interpretation that renders any sections of the statute superfluous and does not give effect to all of the words used."); *see also Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000) ("[T]his Court has repeatedly decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.") (internal quotation marks omitted). As the Seventh Circuit explained, "[a] savings clause is not intended to allow specific provisions of the statute that contains it to be nullified.... CERCLA's savings clause must not be used to gut

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[5] It is far from clear that these other provisions even apply to Plaintiffs' restoration claim. Section 9614(a) preserves the rights of states to enact "state environmental regulations which in some instances set more stringent cleanup standards" than those provided by CERCLA. *Gen. Elec.*, 467 F.3d at 1246. Section 9607(j), the federally permitted release exception to CERCLA liability, says only that a person's liability under that paragraph does not affect that person's liability under any other state or federal laws.

provisions of CERCLA." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998). This Court's determination of whether section 113(h) bars Plaintiffs' restoration claim should turn on its interpretation of that section and the persuasive case law applying it—not irrelevant savings provisions.

An authoritative body of law in the Ninth Circuit and other federal appellate courts articulates the test for determining whether a claim constitutes an impermissible "challenge" to an EPA remedy under section 113(h). That test is grounded in the text of the statute and persuasive precedent—not preemption, not legislative history, and not savings clauses. Plaintiffs' restoration claim plainly qualifies as a "challenge" under that test. Accordingly, the Court should grant Atlantic Richfield's motion based on section 113(h).

II. Plaintiffs' Restoration Claim Is Barred By CERCLA Section 122(e)(6).

Like their arguments directed at section 113(h), much of Plaintiffs' argument concerning section 122(e)(6) is irrelevant. Section 122(e)(6) does not have to preempt Plaintiffs' common law claims in order to bar their request for restoration damages. Plaintiffs' proposed restoration remedy does not have to be proven inconsistent with the remedy selected by EPA in order for section 122(e)(6) to apply—the statute requires EPA's approval of private party cleanup work *to ensure* that such work will not interfere with EPA's remedy. And, it does not matter whether—in their view—"Plaintiffs, as private landowners, are not the type of PRPs contemplated by CERCLA." Resp. at 18. *See Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (holding that it is "irrelevant" that a broad and unambiguous statute "can be applied in situations not expressly anticipated by Congress") (internal quotation marks omitted). Plaintiffs do not dispute any of the statutory prerequisites to the application of section 122(e)(6), and they do not claim to have EPA's authorization to conduct their restoration cleanup. The only relevant point of

contention, then, is whether Plaintiffs are PRPs under CERCLA, so this Reply will focus on that point.

Plaintiffs argue—in a single paragraph and without evidentiary support—that they are not PRPs because they are exempt from strict CERCLA liability as "innocent landowners" or "contiguous landowners." Resp. at 18. As an initial matter, such conclusory statements are insufficient to defeat a motion for summary judgment. *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, ¶ 40, 369 Mont. 444, 299 P.3d 338 ("A party responding to a motion for summary judgment must present 'substantial evidence,' and cannot defeat summary judgment by simply reciting conclusory, unsupported, or speculative statements."). This is especially true here because defenses to CERCLA liability are narrowly construed and Plaintiffs bear the burden of proving they qualify for such defenses. *See PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 185 (4th Cir. 2013) ("'Innocent' current owners and operators seeking to avoid CERCLA's strict liability scheme must meet the requirements necessary to claim the narrow defenses and exemptions specifically established by Congress."); *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 883 (9th Cir. 2001) ("Congress intended the ['innocent landowner'] defense to be very narrowly applicable, for fear that it might be subject to abuse."); *Idaho v. Hanna Min. Co.*, 882 F.2d 392, 396 (9th Cir. 1989) ("Exceptions to CERCLA liability should, therefore, be narrowly construed.") .

In any event, the record evidence demonstrates that Plaintiffs cannot satisfy the requirements of these defenses as a matter of law. In order to qualify for the "'innocent landowner' defense, a party must demonstrate that 'the real property on which the facility is located was acquired by the defendant *after the disposal* or placement of the hazardous substance on, in, or at the facility' and that '[a]t the time the defendant acquired the facility the defendant

did not know and *had no reason to know* that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.'" *United States v. CDMG Realty Co.*, 96 F.3d 706, 716 (3d Cir. 1996) (quoting 42 U.S.C. § 9601(35)(A)) (emphasis added); *see also Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 88 (2d Cir. 1992) ("[T]he 'innocent landowner exception' ... protects landowners who acquire the property after the disposal or placement of hazardous substances on it and who do not know and have no reason to know that the hazardous substances are on the property."). Moreover, the "innocent landowner" defense "is available only to [parties] who make appropriate inquiry, at the time of acquisition, into the previous ownership and use of the property." *Westwood Pharm.*, 964 F.2d at 90; *see* 42 U.S.C. § 9601(35)(B). In the case of properties used for residential, non-commercial purposes, this requires, at minimum, "a facility inspection and title search that reveal no basis for further investigation." 42 U.S.C. § 9601(35)(B)(v).

Here, Plaintiffs assert that they are "innocent landowners" without presenting any evidence that each—or any—of them conducted the requisite inquiry prior to acquiring their properties. Regardless, at least 28 of the properties at issue were acquired while the smelter was still in operation, not "after the disposal" of the alleged contaminants as required under § 9601(35)(A).[6] Of the properties purchased after the smelter closed, title searches on 36 would have revealed easements or covenants for the disposal of smoke and tailings from the smelter, putting the owners on notice of potential contamination.[7] *See Keystone Coke Co. v. Pasquale*, No. 97-6074, 1999 WL 126917, at *2 (E.D. Pa. Mar. 9, 1999) (Plaintiffs could not establish

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[6] *See* Ex. D (chart with dates Plaintiffs acquired their properties); Ex. E (Plaintiffs' discovery responses regarding when they acquired their properties).

[7] *See id*; Ex. F, Affidavit of Martha S. Miller ¶ 4, Miller Report at 5-12. A total of 61 of the 77 properties at issue in this case are subject to an easement or covenant related to smelter emissions.

"innocent landowner" status where "the deed ... provided an easement for the discharge of ... hazardous effluent," because they could not "claim ignorance."), Ex. G. The remaining 13 properties all were acquired after EPA declared the area to be a federal Superfund Site, a fact that would have been discovered through basic due diligence.[8] Thus, those Plaintiffs who purchased their properties "after the disposal" of any waste materials cannot reasonably contend that they made their purchases without knowledge or a "reason to know" of possible contamination. And, therefore, none of Plaintiffs can qualify as "innocent landowners" under CERCLA.

Similarly, the "contiguous landowner" defense requires, *inter alia*, that the party asserting the defense conduct the same basic inquiries before acquiring the property, and that the party "did not know or have reason to know that the property was or could be contaminated." 42 U.S.C. § 9601(35)(B)(v); § 9607(q)(1)(A)(viii). As with the "innocent landowner" defense, Plaintiffs' claim of "contiguous landowner" status fails for a lack of admissible evidence to support the claim, and because the minimal due diligence required would have put Plaintiffs on notice of possible contamination on their properties.

In sum, Plaintiffs have provided no evidence to prove their defenses to CERCLA liability, and the available evidence establishes that they cannot prove such defenses. Because Plaintiffs are PRPs under CERCLA, and because Plaintiffs do not otherwise dispute the requirements of section 122(e)(6), that section also bars their claim for restoration damages.

III. Plaintiffs' Cross-Motion For Summary Judgment Should Be Denied.

Plaintiffs not only oppose this Motion, they cross-move for summary judgment on Atlantic Richfield's eleventh, twelfth, and thirteenth defenses.

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[8] Indeed, many of Plaintiffs' deeds state on their face that the property is located on a Superfund Site. *See, e.g.*, Ex. H.

Atlantic Richfield's eleventh and thirteenth defenses are that Plaintiffs' claims are barred by CERCLA. Plaintiffs' cross-motion as to those defenses should be denied for the same reasons and based on the same evidence (set forth above and in Atlantic Richfield's principal brief) that Atlantic Richfield's motion should be granted. Atlantic Richfield's twelfth defense is that Plaintiffs' claims are preempted by the Supremacy Clause of the United States Constitution. As discussed above, preemption is not relevant to this Motion, and thus Plaintiffs have provided no basis for the Court to grant their cross-motion.

Plaintiffs' cross-motion should be denied for yet another reason. "[T]he moving party must support its motion for summary judgment with an appropriate evidentiary basis before the burden shifts to the non-moving party to set forth facts demonstrating that a genuine issue exists." *Minnie v. City of Roundup* (1993), 257 Mont. 429, 432, 849 P.2d 212, 214 (citing *Mathews v. Glacier General Assurance Co.* (1979), 184 Mont. 368, 381, 603 P.2d 232, 239). Here, Plaintiffs provide no evidentiary basis for their cross-motion.[9]

Because Plaintiffs "presented nothing outside its responsive pleading and the argument of counsel to support its summary judgment motion," they "failed to satisfy the requirement that it support its motion with an appropriate evidentiary basis." *Id.* at 432, 433.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in favor of Atlantic Richfield on Plaintiffs' claim for restoration damages, and deny Plaintiffs' cross-motion.

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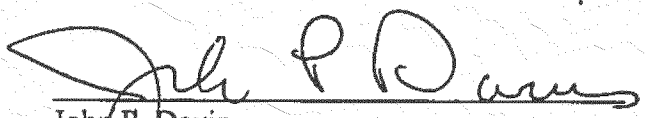
[9] Plaintiffs filed six exhibits with their Response and cross-motion: (1) transcripts of some of their depositions; (2) an excerpt from a manual on CERCLA; (3) an email from defense counsel; (4) and (5) legislative history of CERCLA; and (6) an excerpt of a brief from another case. Of these exhibits, only (1) qualifies as admissible evidence, and Plaintiffs offered it only to show that they seek restoration damages, a point not in dispute. *See* Resp. at 4.

Dated this 1st day of July, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2013, a true and correct copy of the foregoing **ATLANTIC RICHFIELD COMPANY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR RESTORATION DAMAGES AS BARRED BY CERCLA AND RESPONSE TO PLAINTIFFS' CROSS-MOTION** was sent by U.S. mail, first class postage prepaid and addressed to:

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